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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34776

**RESPONSE OF THE NEW YORK, SUSQUEHANNA, AND
WESTERN RAILWAY CORPORATION TO REPLY OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND NEW JERSEY
MEADOWLANDS COMMISSION**

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Dated: November 23, 2005

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The New York, Susquehanna and Western Railway Corporation ("NYS&W") respectfully submits this brief Response to the Reply of the New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission (collectively, "NJDEP"). The most important point in NJDEP's submission is its conclusion that the Board should "not initiate such a proceeding at this time." *See* NJDEP Pet. at 1, 6. NYS&W agrees with this conclusion, both because the NSWMA Petition is moot, and because a federal district court proceeding is considering precisely the same issues presented by that Petition, and has declined to refer the matter to the Board. Below, NYS&W clarifies the record with respect to certain misstatements and mischaracterizations made in the NJDEP filing.

NJDEP's suggestion that NYS&W's operations pose "public health and environmental problems" is wrong and entirely unsupported by any evidence. Indeed, NYS&W's transportation of construction and demolition materials ("C&D") facilitates the safe and efficient removal (and eventual disposal at the destination disposal site) in a more environmentally sound manner than the alternative of transporting the same materials over the public highways via motor carriers.

Not only has NJDEP failed to demonstrate *any* adverse “environmental” or “public health” effects from NYS&W’s operations, NJDEP’s submission ignores entirely the extensive measures that NYS&W has taken to address NJDEP’s and NJMC’s concerns. For example, NYS&W is in the process of constructing buildings enclosing its transloading facilities in North Bergen. When those buildings are complete (NYS&W plans to have construction of all of the buildings completed by the end of 2005), all C&D transloading facilities operated by NYS&W in North Bergen will be covered and enclosed. These are not the actions of a “rogue operator” (*cf.* NJDEP Resp. 1-2); they are the actions of a responsible corporation working to provide essential rail transportation services while minimizing the impact of its operations on the surrounding localities.

NJDEP’s unsupported assertion that there should not be “any doubt” regarding “public health and environmental problems” at NYS&W’s facilities is further belied by the fact that the District Court has entered a temporary restraining order permitting NYS&W to continue its operations, and enjoining NJDEP from enforcing its “transloading facility” regulations against NYS&W. *See* NJDEP Reply at 1-2. Significantly, the Court (pursuant to an extensive hearing on the record) extended that temporary restraining order on October 24 – *after* it saw evidence from NYS&W and NJDEP (including photographs of the transloading facilities in question) regarding the state of NYS&W’s transloading facilities.

Nor has NYS&W “contend[ed] before Judge Hayden [in *New York, Susquehanna and Western Railway Corp. v. Campbell* (Civil Action No. 05-4010 (KSH)) (*“NYS&W v. Campbell”*)] . . . that the rail carrier is answerable to no one for compliance with any environmental or public health and safety statute or regulation.” NJDEP Reply at 4 n.4. NYS&W has not argued that it is exempt from all public health and safety regulations. Rather,

NYS&W has made a more limited argument that is fully consistent with the Board's past guidance: namely, that ICCTA (including 49 U.S.C. § 10501(b)) preempts certain NJDEP regulations that purport to govern the design, construction, and operation of truck-rail transload facilities.

The facts and the record before the District Court demonstrate that NYS&W is not a "rogue operator" as NJDEP claims, but rather a responsible corporate citizen operating in accordance with the law and sound environmental and public health practices. *Cf.* NJDEP Reply at 1-2, 4 n.4. In response to concerns expressed by the Board in *High Tech* and other decisions, NYS&W carefully designed its operation of the North Bergen transloading facilities to comply with the Board's directives in *Hi-Tech*. Further, as the District Court record shows, NYS&W is working to voluntarily implement measures at its transloading facilities that substantially address the NJDEP's concerns. NYS&W has consistently advised NJDEP and other state and local government agencies of its willingness and desire to work with them to resolve their legitimate concerns and disputes in a manner that is both effective and not unduly burdensome to rail transportation or interstate commerce. To date, however, the State has refused to engage in meaningful discussions, preferring instead to litigate these issues in court and in state and local administrative proceedings.¹

In any event, NJDEP's factual mischaracterizations are simply not relevant to the question of whether the Board should institute the declaratory order proceeding requested by NSWMA. NJDEP correctly concludes that the Board should not. The 16th Street facility is

¹ Leading New Jersey officials, including the Governor, have publicly promised to "unleash inspectors of all kinds" to "harass the hell" out of NYS&W. *See, e.g.*, Newark Star Ledger (July 26, 2005) (quoting from press conference held by Governor Richard Codey).

closed, and NSWMA's Petition is plainly moot. *See* NYS&W Reply at 8-10.² Because the Petition presents no live case or controversy, the Board should decline to institute a declaratory proceeding.

Moreover, the federal District Court for the District of New Jersey is presently considering the same issue presented by NSWMA's Petition – whether state regulation of the 16th Street Facility is preempted by ICCTA – and the Court has chosen not to refer the issue to the Board. Indeed, while NSWMA's Petition only provides the Board with conclusory assertions based on outdated photographs and a defunct Operating License, the District Court has the benefit of an extensive factual record that will detail the actual conditions of NYS&W's facilities and the actual business arrangements between NYS&W, its shippers, and its loaders. Under these circumstances the Board should not institute a declaratory order proceeding.

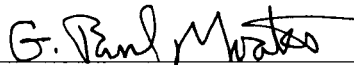
As NYS&W noted at the outset, NJDEP's conclusion that the Board should not institute a declaratory order proceeding supports NYS&W's position that the Board should deny the NSWMA Petition and dismiss this proceeding.

² NJDEP's unsupported speculation that the 16th Street Facility may still be in operation is incorrect. The facility is closed.

CONCLUSION

For the foregoing reasons and the reasons detailed in its November 14, 2005 Reply, NYS&W respectfully requests that the Board deny NSWMA's Petition for Declaratory Order.

Respectfully submitted,



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Dated: November 23, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of November 2005, I served the foregoing Response of The New York, Susquehanna, And Western Railway Corporation to the Reply of the New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission by causing a copy thereof to be delivered by overnight courier to:

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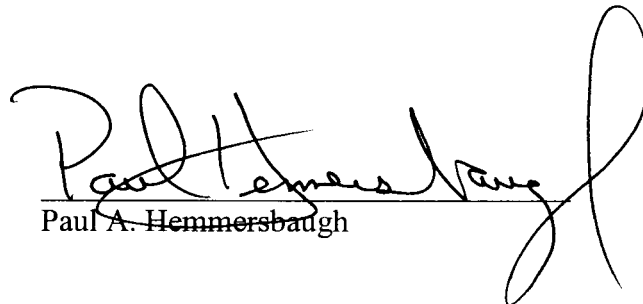
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